
STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

SCT No. 141795

Plaintiff-Appellee,

COA No. 291592

v

Wayne Circuit No.
08-012499-FC

FRANKLIN IVEY,

Defendant-Appellant.

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141795

Appellant's Supplemental Brief

FILED

FEB 28 2011

CORBIN R. DAVIS
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Argument

Franklin Ivey was acquitted of first-degree murder and felony firearm. This case is on appeal from the conviction of Mr. Ivey of felon in possession¹ following a February 2009 jury trial in Wayne County Circuit Court, the Hon. Timothy M. Kenny presiding.

Mr. Ivey was previously convicted of breaking and entering² in 1995. *See* PSIR. This is Mr. Ivey's only other felony conviction. Mr. Ivey never took steps to set aside his 1995 conviction or have his right to possess a firearm restored.³ Had he done so successfully, he would not be before this Court today because the FIP statute would not apply to him.⁴ In some contexts, "equity regards and treats as done what in good conscience ought to be done."⁵ It is a shame that that maxim does not apply here to Mr. Ivey, who has been law-abiding since 1995 until he ran afoul of a violent attacker in 2008. Mr. Ivey is well-aware that it is he, himself, who failed to act under the FIP law to immunize himself from the current charge. But it is still a shame that Mr. Ivey's blessed optimism that he had no need to expunge his old conviction now comes back to haunt him after all these years of good citizenship.

Mr. Ivey was scored 100 points for the killing of a victim under OV 3 (MCL777.33):

¹ MCL 750.224f

² MCL 750.110

³ MCL 28.424

⁴ *See* MCL 750.224f(2)(b) and (3)

⁵ *Haack v Burmeister*, 289 Mich 418, 425 (1939).

Sec. 33. (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A victim was killed	100 point s
(b) A victim was killed	50 point s
(c) Life threatening or permanent incapacitating injury occurred to a victim	25 point s
(d) Bodily injury requiring medical treatment occurred to a victim	10 point s
(e) Bodily injury not requiring medical treatment occurred to a victim	5 point s
(f) No physical injury occurred to a victim	0 point s

(2) All of the following apply to scoring offense variable 3:

(a) In multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points.

(b) Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.

(c) Score 50 points if death results from the commission of a crime and the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive and any of the following apply:

(i) The offender was under the influence of or visibly impaired by the use of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.

(ii) The offender had an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning October 1, 2013, the offender had an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

(iii) The offender's body contained any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or a controlled substance described in section 7214(a)(iv) of the public health code, 1978 PA 368, MCL 333.7214.

(d) Do not score 5 points if bodily injury is an element of the sentencing offense.

(3) As used in this section, "requiring medical treatment" refers to the necessity for treatment and not the victim's success in obtaining treatment.

Some of the prosecution's argument that the 100 points was proper depends on the findings of the jury and the trial court at sentencing. The only thing that the trial court said on the record regarding the scoring of OV 3 at 100 points is this:

THE COURT: Looking at the instructions to OV Three which states score 100 points if death results from the commission of the offense. That offense is being a felon in possession of a firearm, and that homicide is not the sentencing offense, which is applicable here.

I'll note the defense's objection, but I do think 100 points are to be scored.

(3/25/09 T 9).

The prosecution begins its argument by claiming, “No court has held that a successful claim of self-defense to some charged offenses at trial will excuse the scoring of points when calculating the variables for other offenses, that the finder of fact found were committed beyond a reasonable doubt.” *See Answer*, p. 9. This is not the situation in Mr. Ivey’s case. Mr. Ivey’s argument is not that his acquittal of murder by way of self-defense excuses the scoring of points for the killing under the FIP conviction. Rather, the argument is that Mr. Ivey was acquitted of FIP by way of self-defense, too – until he held on to the gun for too long and later disposed of it. In other words, the reason that he should not be scored for the killing is because the cloak of self-defense covers his actions over the entire transaction surrounding the killing, including his otherwise felonious possession of the gun.⁶ It is only at the point that the decedent was shot, the danger ended, and Mr. Ivey (per the jury) maintained possession of the gun for too long that his possession became felonious. And this felonious possession had nothing to do with the killing, under any causal theory, whether “but for” or proximate.

Regarding causation, the prosecution writes:

MCL 777.33 allows the sentencing court to score 100 points when “[a] victim was killed.” The instructions for Offense Variable 3 provide that 100 points should only be scored “if death results from the commission of a crime and homicide is not the sentencing offense.” There is no dispute that the sentencing conviction here, Felon in Possession of a Firearm, is not a homicide offense. The Court of Appeals has found that, by using the word “results” instead of “causes” in MCL 777.33(2) (a), the legislature directed sentencing courts that only factual

⁶ *See generally, People v Dupree*, 486 Mich 693 (2010).

causation need be established. A death results from the commission of an offense if "but for" the commission of the crime, the death would not have occurred. Applied here, 100 points could be properly scored if Judge Kenny found that, but for defendant's criminal possession of a firearm, a victim would not have been killed. A victim under MCL 777.33 is not limited to only the victim of the sentencing offense but "includes any person harmed by the criminal actions of the charged party."

There is much that is correct in this paragraph, but where it goes wrong is the heart of the case. OV 3 does use the phrase "results in," which Michigan case law has interpreted as meaning factual causation, not proximate causation. But statutes must be read as a whole, and courts should not interpret them so as to render one phrase or clause nugatory.⁷ The prosecution acknowledges that OV 3 also discusses the need for a victim, but tries to interpret this language away. In doing so, it provides an inferior reading of the statute that improperly renders the "victim" language nugatory. The two portions, "a victim was killed" and "if death results from the commission of a crime" must be read in harmony. Reading them in harmony requires not merely factual causation of harm to any person related to the acts of the defendant, but a victimhood test -- targeted acts based on proximate causation of criminal acts.

The Legislature is capable of making a distinction between "victims" and "human beings" because it did so in OV 1. The Court of Appeals found this distinction significant in upholding the scoring of OV 1 in Mr. Ivey's case. In OV 1, the Legislature expressly provided that defendants should be scored 25 points if a

⁷ *People v Perkins*, 473 Mich 626, 638 (2005).

gun is discharged at or toward a human being, and under the same instruction, defendants should be scored 25 points if a victim was cut with a knife. The Legislature considers “victims” and “human beings” different categories, and victims are a narrower category.

Applying this understanding of the Legislature’s use of “victim” to the interpretation of OV 3, it becomes clear that the Legislature intended OV 3 to be scored only when the more narrow category of targets of the criminal activity of the defendant are killed, not the broader category of all human beings whose death is factually caused by the defendant.

Reinforcing this conclusion is that in addition to the use of the term “victim,” OV 3 requires scoring only “if death results from *the commission of a crime*.” The prosecution argues that Mr. Ivey’s successful assertion of self-defense is of no moment because affirmative defenses excuse or justify a crime, but the crime is still committed. This is not true, legally or morally. The prosecution writes:

To the contrary, an affirmative defense “admits the crime but seeks to excuse or justify its commission. It does not negate specific elements of the crime.” The very nature of an affirmative defense is that the defendant admits that he has committed a crime but seeks to avoid conviction for that crime by claiming an excuse or justification.

See Answer, p. 12.

There was a historical distinction between excuse and justification defenses. (Case law often blurs the lines by using the terms excuse and justification interchangeably). Self-defense is generally considered a justification defense. Justification and excuse defenses were treated very differently at common law:

In very early English legal history the distinction between justifications and excuses was a matter of profound practical significance. In the case of felonies, a justified actor was acquitted of the offense; an excused actor, however, was subject to the same punishment as a convicted offender (the death penalty and forfeiture of his property), although he could escape the death sentence with a pardon from the Crown.^[8]

This distinction existed because the justification defense defines conduct “otherwise criminal, which under the circumstances is socially acceptable and which deserves neither criminal liability nor even censure.”⁹ Excuse defenses – like insanity – on the other hand, focus on the actor, admitting socially censurable conduct but pleading for leniency due to some special circumstance of the defendant.¹⁰ Under standard affirmative defense law, and under the facts of Mr. Ivey’s case, no crime was committed because Mr. Ivey was justified in his acts – he acted in self-defense to protect himself and his girlfriend, something the law and society approve of. As Professor LaFave wrote in a section quoted approvingly by this Court:

It is only just that one who is unlawfully attacked by another, and who has no opportunity to resort to the law for his defense, should be able to take reasonable steps to defend himself from physical harm. When the steps he takes are reasonable, he has a complete defense to such crimes against the person as murder and manslaughter, attempted murder, assault and battery and the aggravated forms of assault and battery, and perhaps other crimes as well. His intentional infliction of (or, if he misses, his attempt to inflict) physical harm upon the

⁸ Dressler, *Understanding Criminal Law* (2d ed 1995) at 185.

⁹ Heberling, Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 Colum L Rev 914, 916 (1975).

¹⁰ Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 Wayne L Rev 1155, 1162-63 (1987).

other, or his threat to inflict such harm, is said to be justified when he acts in proper self-defense, **so that he is not guilty of any crime.**^[11]

The prosecution goes awry in its analysis because it gets stuck mistakes the list of elements of the crime for a *chronological* statement about the order of acts in a murder/self-defense case. There are elements the prosecution must prove in a murder/self-defense case: (1) the intentional killing of a human, (2) with premeditation and deliberation;¹² and that it must also disprove: (1) the defendant honestly and reasonably believed that he was in danger, (2) the danger which the defendant feared was serious bodily harm or death, and (3) the action taken by the defendant appeared at the time to be immediately necessary, i.e., the defendant is only entitled to use the amount of force necessary to defend himself.¹³ The prosecution sees a *seriatim* list in the case law and lays that artificial map of the law over the flesh and blood facts, positing that first, Mr. Ivey premeditated, then Mr. Ivey intentionally killed, and finally, *after he was done*, Mr. Ivey acted in self-defense.. This is not the way self-defense works *at all*. Or rather, it may be the way it works in a courtroom in the order of proofs, but when Mr. Ivey was acting, he did not first kill Mr. Booker, and then become justified *after* the fact. If Mr. Ivey was justified in killing Mr. Booker, he was justified over the entire period of his actions. The cloak of justification covered the entire transaction.

¹¹ 2 LaFave, *Substantive Criminal Law* (2d ed), § 10.4(a), pp. 143-144 (quoted in *People v Dupree*, 486 Mich 693, 707-08 (2010)) (emphasis added).

¹² *People v Taylor*, 275 Mich App 177, 179 (2007); MCL 750.316(1)(a)

¹³ MCL 780.972; MCL 780.961; *People v Heflin*, 434 Mich 482, 502 (1990).

He was literally *justified* in killing Mr. Booker. As explained above, this is correct legally, but morally, too. In what strange social system does the prosecution move where a man commits a “crime” (something society and the law call to censure and punishment) at the same time that he commits an act that society and the law justify (something that they approve of and even laud)? No, when the courts speaks of a defendant admitting a “crime” when he asserts an affirmative defense, they are speaking very strictly (if sloppily) about the defendant’s admission of the *elements* of the crime. But admitting to the elements is not the same thing as admitting that there was something socially destructive about one’s actions. In an affirmative defense case, admitting the elements doesn’t tell even half the story, because the case turns entirely on the affirmative defense. If A intentionally shot and killed B, the prosecution would say a crime was committed, no further inquiry needed. But what if B was an enemy soldier? What if B was a death row inmate, and A his lawful executioner? The elements of a crime can coexist with a societally approved act – an act that is in no way a crime.

The prosecution continues: “Here, even if defendant was acting in self-defense, at the time he shot and killed Booker he was committing a crime by possessing a firearm.” *See Answer*, p. 12. The prosecution tries to avoid the rule of *People v McGraw*, 484 Mich 120, 133 (2009) and its attendant problems for scoring OV 3 in this case by arguing more or less explicitly that Mr. Ivey was scored not on the basis of a separate crime, but for the crime of FIP during the killing. In other words, the prosecution tries to avoid the clear import of the jury’s verdict and the

proofs at trial to conclude that Mr. Ivey was convicted of FIP not for his unreasonable actions concerning the gun after the shooting, but for possessing the gun *during* the shooting.

First, Mr. Ivey respectfully suggests that whatever merit is possessed by the prosecution's theory about the inscrutable nature of the jury's verdict, the trial court would have abused its discretion had it scored the variables under the theory that Mr. Ivey was not acting in self-defense when he possessed the gun during the shooting. The entire trial record is contrary to such a score. Second, the prosecution falls into the trap that has caught unsuspecting criminal defendants in the past: trying to explain away a jury's verdict as a compromise or some other anomaly despite all record evidence to the contrary. See *People v. Johnson*, 427 Mich 98 (1986), where this Court made the following relevant comments:

There is no basis on this record to assume that the jury's verdict was a product of compromise. There is simply no more reason for assuming that jurors have compromised on a verdict when there is an erroneous charge than there is to believe they have simply reached a middle ground when several instructions are correctly given. If there was error in allowing the first-degree murder charge to go to the jury, the jury corrected that error by acquitting defendant of that charge and returning a proper verdict of second-degree murder. Most courts agree that a proper verdict of second-degree murder cures an error in instructing a jury on first-degree. . . . While Michigan cases have not agreed . . . any other conclusion is based on judicial speculation that jurors who have acquitted the defendant have compromised their views despite an express direction from the trial court to the contrary.^[14]

¹⁴ *Id.* at 116, n. 15.

The jury's verdict is most easily explicable as the logical consequence of the trial arguments: Mr. Ivey was justified throughout the shooting, but lost that justification for possession after the shooting and acted unreasonably thereafter. That is why the jury found as it did. And the jury's notes to the court during deliberation evidence this:

"How many years after committing a felony does it take to be allowed to take gun from someone who is attempting to do you bodily harm before the law says you are allowed to use it to defend yourself."

(3-3-09 T 9).

"since it's okay to use a firearm in defense of yourself, is it similarly okay to transport the gun due to an Adrenalin rush/ unclear thinking after such an incident,

Mr. Ivey disposed of the gun once he came to his senses."

(3/3/09 T 15). It was after this second note and an instruction from the trial court about Mr. Ivey's duties as to the handling of the gun that Mr. Ivey was finally convicted of FIP. From the parties' arguments to the proofs at trial to the jury's notes and the trial court's instructions, *contra* the prosecution, it is clear exactly what the jury did and why.

Next, the prosecution states that the trial court simply made a legally permissible factual finding based on a preponderance of the evidence that might have been contrary to the jury's verdict. But while the trial court *ruled*, it didn't make any findings. The only thing that it said regarding the scoring of OV 3 was:

THE COURT: Looking at the instructions to OV Three which states score 100 points if death results from the

commission of the offense. That offense is being a felon in possession of a firearm, and that homicide is not the sentencing offense, which is applicable here.

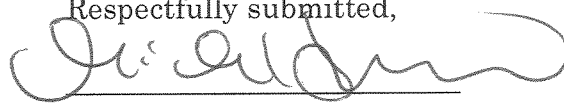
I'll note the defense's objection, but I do think 100 points are to be scored.

(3/25/09 T 9). It is not clear that the trial court was ruling the way it did because it thought itself bound under the law, or because it was making factual findings contrary to the jury's verdict, or for some other reason. This Court could remand for more specific findings, if it believed it necessary. But it should not decide the case based on factual findings that the prosecution conjures from outside the record.

Finally, while this Court referenced only OV 3 in its order permitting this supplemental brief, Mr. Ivey again objects to the scoring of OV 1 for the reasons raised in his Application.

It was error to score both OV 1 and OV 3. Mr. Ivey's total OV score should have been 0, making his sentencing guidelines range with the habitual second enhancement 0 to 3 months'. Under the *Francisco* rule, Mr. Ivey is entitled to resentencing because this is a different guidelines range than that used at the original sentencing.

Respectfully submitted,



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Dated: February 28, 2011